

OP. Ltr. 90-12 Agency Employee Misconduct; Disciplinary Records

Section 92F-14(b), the statute at issue in this opinion, was amended by Act 191, Session Laws of Hawaii 1993, which may materially affect the conclusion reached in similar future opinions. See instead, e.g., OIP Op. Ltr. No. 98-5 at 19-21.

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February 26, 1990

MEMORANDUM

TO: Ms. Mie Watanabe, Equal Employment Officer
University of Hawaii at Manoa

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Disclosure of Sexual Harassment Complaint and
Disciplinary Action Taken Against University of
Hawaii Faculty Member

This is in reply to a letter dated October 9, 1989, from Deputy Attorney General Ruth I. Tsujimura, requesting an advisory opinion regarding whether the University of Hawaii-Manoa ("University") may disclose the identity of a particular faculty member against whom disciplinary action was taken, and the disciplinary action taken, based upon a written complaint filed by a student under the University's Sexual Harassment Policy and Complaint Procedure.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, the University must disclose the identity of a particular faculty member against whom disciplinary action was taken, and the disciplinary action taken, resulting from a complaint filed in accordance with the University's Sexual Harassment Policy and Complaint Procedure.

BRIEF ANSWER

Under the UIPA, an agency employee does not have a significant personal privacy interest in "information relating

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to the status of any formal charges against [an agency] employee, and disciplinary action taken." Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1989). Thus, this information is not excepted from disclosure under the UIPA's privacy exception set forth at section 92F-13(1), Hawaii Revised Statutes. Further, there is no other UIPA exception that would, in our opinion, apply to this information in this case. Accordingly, it is necessary to determine what information relates "to the status of any formal charges against the employee and disciplinary action taken."

As we construe section 92F-14(b)(4), Hawaii Revised Statutes, an agency employee does not have a significant privacy interest in general information regarding the status of "formal" charges. We conclude in this case that the written complaint filed by the student against the subject faculty member in accordance with the University's Sexual Harassment Policy and Complaint Procedure was sufficiently "formal" for purposes of this UIPA provision. Thus, in our opinion, an agency must disclose the fact that a "formal" charge or complaint has been filed, the name of the agency employee against whom the complaint has been lodged, and disciplinary action taken in response to the formal charge, if any. In addition, in our opinion, an agency must disclose whether the charge is pending, under investigation, or has been dismissed, together with any other information which is "public" under section 92F-12(a)(14), Hawaii Revised Statutes. We do not, however, believe an agency is required by section 92F-14(b)(4), Hawaii Revised Statutes, to disclose the formal complaint or charge itself, other supporting documentation, the investigatory record, or the complainant's identity.

Lastly, we conclude that agencies are only required by section 92F-14(b)(14), Hawaii Revised Statutes, to disclose disciplinary action taken in response to a "formal charge," not routine employee reprimands, suspensions, or other sanctions that do not result from a "formal" charge. However, an agency employee's significant privacy interest in discipline taken in response to charges which are not "formal," may, in a given case, be outweighed by the public interest in disclosure under section 92F-14(a), Hawaii Revised Statutes.

FACTS

A student at the University filed a written complaint with the University's Equal Employment Officer ("EEO") alleging that a faculty member had engaged in conduct constituting "sexual

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harassment" as that term is defined by the University's written Sexual Harassment Policy and Complaint Procedure ("Procedure").

Pursuant to University procedure, a "formal complaint" must be in writing and include sufficient information to permit fact-finding and investigation. Additionally, the complaint must be initiated within 180 days of the alleged incident, unless good cause is shown for a later filing. The policy also provides "[a]ll complaints will remain confidential." Following the filing of a "formal complaint," the EEO notifies the President of the University that a complaint has been filed and "is empowered to collect whatever information is necessary to investigate the complaint, including questioning all parties concerned." We are informed that the EEO, in executing this policy, interviews the complainant, respondent and potential witnesses, and allows written submissions by the parties during the investigatory process. Further, we are informed that although not stated in University procedure, the respondent is notified that a formal complaint was filed, as well as the basis for the complaint.

Following the investigation, the EEO makes "the information available to the President or appropriate supervisor with a recommendation on disciplinary action if warranted." Again, although not stated in the University's procedures, the EEO makes written findings and provides copies to the faculty member and the complainant.

In the event that disciplinary action in the form of a suspension or discharge is imposed upon the faculty member, the collective bargaining agreement between the University's Professional Assembly and the University's Board of Regents requires that additional procedures be followed, none of which are relevant in the instant case, as the subject faculty member was neither suspended nor discharged.

With reference to the formal complaint in this case, the University concluded, after its investigation, that probable cause existed to take disciplinary measures against the subject faculty member. The individual who filed the complaint against the faculty member, the University's student newspaper, a representative of the University's student government, and a newspaper reporter have each requested access to information regarding the disciplinary action taken in this case. The University seeks an advisory opinion regarding what information must be disclosed under the UIPA, concerning the disciplinary

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proceeding involving the faculty member who was the subject of the student's complaint in this case.

DISCUSSION

The UIPA, the State's new public records law, promotes open government while protecting the individual's constitutional right to privacy. Among the UIPA's policies and purposes are to "[b]alance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-2 (Supp. 1989). In addition, the Legislature concluded that "[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." Id.

In enacting the UIPA, however, the Legislature exempted from the Act's general rule of public access certain limited categories of records, which are set forth at section 92F-13, Hawaii Revised Statutes, which provides in pertinent part:

This chapter shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

The legislative history to the UIPA declares that if the individual's "privacy interest is not 'significant', a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg. Reg. Sess., Haw. S.J. 689, 690 (1988). Moreover, the Legislature provided guidance in determining whether disclosure of a government record would result in the disclosure of a record in which a person has a "significant" privacy interest. Section 92F-14, Hawaii Revised Statutes, states in relevant part:

§ 92F-14 Clearly unwarranted invasion of personal privacy. (a) Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual.

(b) The following are examples of information in which the individual has a significant privacy interest:

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- (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except information relating to the status of any formal charges against the employee and disciplinary action taken or information disclosed under section 92F-12(a)(14); [Emphasis added.]

This section is nearly identical to section 3-102(b)(4) of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform Laws. Section 3-102 of the Model Code reads in relevant part:

(a) Disclosure of an individually identifiable record does not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual.

(b) The following are examples of information in which the individual has a significant privacy interest:

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- (4) information in an agency's personnel file, or applications, nominations, recommendations or proposals for public employment or appointment to a governmental position; except information relating to the status of any formal charges against the employee and disciplinary action taken; [Emphasis added.]

The Comment¹ to section 3-102 of the Model Code explains:

¹ The UIPA's legislative history directs those construing the Act to the Model Code commentary "where appropriate" to guide in the interpretation of similar UIPA provisions. H.R. Stand. Comm. Rep. No. 2580, 14th Leg., Reg. Sess., H.J. 969, 972 (1988).

Portions of subsections (b)(1), (2), (4) and (8) not only identify information possessing a significant individual privacy interest, but also identify closely related information which is outside the scope of the privacy interest. This latter information is subject to disclosure as though it were part of the Section 3-101 enumeration of disclosable information. [Emphasis as in original.]

As the above comment makes clear, disclosure of "information relating to the status of any formal charges against [an agency] employee and disciplinary action taken" does not constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. By interpreting section 92F-14(b)(6), Hawaii Revised Statutes, in accordance with commonly accepted principles of statutory construction, we believe that an agency must disclose disciplinary action taken only if imposed in response to a formal charge. The phrase "except information relating to the status of any formal charges against the employee and disciplinary action taken," employs the use of the word "and." "Where two or more requirements are provided in a section and it is the legislative intent that all requirements must be fulfilled in order to comply with the statute, the conjunctive 'and' should be used." 1A N. Singer, Sutherland Statutory Construction § 21.4 (Sands 4th ed. rev. 1985). Thus, we do not believe that section 92F-14(b)(4), Hawaii Revised Statutes, requires agencies to disclose routine employee reprimands, suspensions, or other sanctions, that do not result from a "formal charge."

At least two states' open records laws have provisions similar to section 92F-14(b)(4), Hawaii Revised Statutes. Indiana's Access to Public Records Act exempts personnel files of public employees from mandatory disclosure, except for:

(A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) Information relating to the status of any formal charges against the employee; and

(C) Information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged.

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Ind. Stat. § 5-14-3-4(b)(8) (Supp. 1988) (emphasis added).

Similarly, the Minnesota Government Data Practices Act makes all personnel data concerning public employees confidential except for:

name; actual gross salary; salary range; contract fees; actual gross pension; the value and nature of employer paid fringe benefits; the basis for and the amount of any added remuneration, including expense reimbursement, in addition to salary; job title; job description; education and training background; previous work experience; data of first and last employment; the status of any complaints or charges against the employee, whether or not the complaint or charge resulted in a disciplinary action; and the final disposition of any disciplinary action and supporting documentation; work location;

Minn. Stat. Ann. § 13.43(2) (1988) (emphasis added).

Neither the UIPA, the Model Code Commentary, nor other authorities define what constitutes a "formal charge." It is a cardinal rule of statutory construction that words used in a statute are to be understood in their "general or popular use or meaning." Haw. Rev. Stat. § 1-14 (1985). Webster's Ninth New Collegiate Dictionary 485 (1988 ed.) defines "formal" as "following or according with established form, custom, or rule . . . done in due or lawful form." See also Severson v. Sueppel, 152 N.W.2d 281, 284 (Iowa 1967). Webster's Third New International Dictionary 893 (1967 ed.) defines "formal" as "based upon forms and rules . . . or following a prescribed form . . . of a legal procedure: requiring special or stipulated solemnities or formalities to become effective." (emphasis as in original). Similarly, Webster's Ninth New Collegiate Dictionary 227 (1988 ed.) defines "charge" as: "6 a: ACCUSATION, INDICTMENT b: a statement of complaint or hostile criticism." Webster's Third New International Dictionary 377 (1967 ed.) defines "charge" as "to bring an accusation against: call to account: BLAME . . . to make an assertion against esp. by ascribing guilt or blame for an offense or wrong."

We believe that a "formal charge" is one that is made pursuant to, and in accordance with, an established agency policy or procedure under which allegations of misconduct may be lodged against an agency employee. In our opinion, however,

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the existence of a written complaint against an agency employee, does not by definition, constitute a "formal charge." Thus, in applying section 92F-14(b)(4), Hawaii Revised Statutes, it is necessary to review each agency's policies and procedures to determine in a given case whether a "formal charge" has been made.

With respect to the issue presented for our opinion, to the extent that the student here made a formal complaint or accusation in accordance with the University's established Sexual Harassment Policy and Complaint Procedure, we conclude that this charge was sufficiently "formal" for purposes of section 92F-14(b)(4), Hawaii Revised Statutes.

Where disciplinary action is taken against an agency employee which is not in response to a "formal" charge, that employee, by definition, has a significant privacy interest in such information. See Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1989). However, in the face of particularized allegations of impropriety or misconduct in the investigation of the complaint by the agency, or where the employee involved has significant managerial duties within the agency, or depending upon the severity of the charges, the public interest in disclosure may outweigh the employee's privacy interest in the fact that disciplinary action was taken and in the circumstances surrounding that action. See Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). Under the UIPA, such a determination must be made on a case-by-case basis.

What constitutes "information relating to the status of" such formal charges presents another difficult issue. Neither the UIPA's legislative history, the Model Code Commentary, nor other authorities offer any guidance in determining the meaning of this phrase. We believe that the use of the word "status" contemplates only the disclosure of general information concerning the disciplinary process. "Status" is defined by Black's Law Dictionary 1264 (5th ed. 1979) as "[s]tanding; state or condition." Similarly, it is defined by Webster's Third New International Dictionary 2230 (1967 ed.) as "3: state of affairs: SITUATION." Had the drafters of the Model Code or the Legislature intended that the complaint itself or the entire disciplinary record be available, they could have stated such fact. Indeed, the Minnesota Data Practices Act makes available "all supporting documentation." See, Minn. Stat. Ann. § 13.43(2); Annandale Advocate v. City of Annandale, 18 N.W.2d 522 (Minn. App. 1988) (investigative data disclosed following final disposition). Further, we feel constrained to

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construe "status" narrowly given the clear legislative declaration that agency employees have a significant privacy interest in "information in an agency's personnel file."

Therefore, where disciplinary action is taken in response to a "formal charge," we believe that section 92F-14(b)(4), Hawaii Revised Statutes, requires agencies to disclose government records, or portions of such records, which reveal that a complaint has been made, whether the proceeding is pending or concluded, and the identity of the employee against whom the formal charge was made. In addition, we conclude that this UIPA provision requires agencies to disclose disciplinary sanctions imposed, if any, that result from the formal charge, together with any other information which is "public" under section 92F-12(a)(14), Hawaii Revised Statutes.

We do not, however, construe section 92F-14(b)(4), Hawaii Revised Statutes, to require disclosure of the formal charge itself, the complainant's identity, or supporting investigatory records. As to the disclosure of a complainant's identity, see, OIP Opinion Letter No. 89-12 (Dec. 12, 1989).

We express no opinion concerning whether the disclosure of information relating to "the status of any formal charges and disciplinary action taken" would be in violation of federal civil rights laws or whether such information is "confidential" under a federal statute or regulation. See Haw. Rev. Stat. § 92F-13(4) (Supp. 1989). Lastly, although we conclude that the disclosure of "the status of any formal charges and disciplinary action taken" would not, on these facts, result in the "frustration of a legitimate government function" under section 92F-13(3), Hawaii Revised Statutes, in a special case, this UIPA exception may authorize the non-disclosure of this information.


CONCLUSION

Under the UIPA, agency employees do not have a significant personal privacy interest in "information relating to the status of any formal charges against [them] and disciplinary action taken." Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1989). The disclosure of this information would not, therefore, "constitute a clearly unwarranted invasion of personal privacy" under the exception set forth at section 92F-13(1), Hawaii Revised Statutes. Nor, in our opinion, is such information in this case, protected from disclosure under the other UIPA exceptions under part II of the Act.

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In construing section 92F-14(b)(4), Hawaii Revised Statutes, we conclude that where other UIPA exceptions are inapplicable, this section only requires an agency to disclose disciplinary action taken which results from the making of "formal charges" against an employee. We believe that under the UIPA, a "formal charge" is one that is made in accordance with an established agency policy or procedure under which allegations of misconduct may be lodged against an agency employee. In our opinion, the written complaint made against the subject faculty member in this case was sufficiently "formal," having been duly filed pursuant to, and in accordance with, the University's established Sexual Harassment Policy and Complaint Procedure.

In further construing section 92F-14(b)(4), Hawaii Revised Statutes, we conclude that an agency must disclose the fact that a "formal charge" has been made, the name of the employee against whom the complaint was made, and the disciplinary action taken, if any. Further, we conclude that an agency is not required to disclose disciplinary action taken against an agency employee that does not result from a "formal charge," unless the public interest in disclosure of such information outweighs the employee's significant privacy interest in such data, under section 92F-14(a), Hawaii Revised Statutes.




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